U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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DATE: APR 0 2 2012 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a computer software engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief and copies of previously submitted materials.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The petitioner, on appeal, asserts that he submitted Form ETA-750B with his initial petition. The form he submitted, however, is a photocopy from March 2005, more than five years before the petition's June 2010 filing date; this evidence was part of a set of documents relating to his employment from 2004 to 2006, as part of the evidence relating to his prior employment. The information on this form was outdated by the time the petitioner submitted it in 2010. Among other things, the Form ETA-750B lists an alien's employment over the last five years. The form from

March 2005 could not, and therefore did not, provide any information about the petitioner's employment from June 2005 to June 2010. The AAO does not consider this resubmission of an outdated photocopy to be sufficient to satisfy a central purpose of the form (*i.e.*, to provide recent employment information).

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation* (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding

an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 28, 2010. The petitioner stated: "Personal technology initiatives I have been engaged in are also directly related to the improvement of the environment and more protective use of natural resources." The petitioner did not elaborate on this claim. Instead, the petitioner devoted the bulk of his introductory statements to the claim that his former employer, [redacted] had discriminated against him on the basis of race, and then fired him in retaliation for lodging a protest. Most of the evidence accompanying the initial filing concerned the petitioner's employment at [redacted] from 2004 to 2006. The petitioner also submitted copies of police reports and related materials, alleging that unnamed parties have threatened and harassed him, for example by disturbing his sleep and administering an electric shock while he was in his automobile.

On August 16, 2010, the director issued a request for evidence, stating that the petitioner had "not identified [his] proposed employment" and that "it is difficult for [USCIS] to determine" the petitioner's eligibility for the waiver without knowing what the petitioner proposes to do in the United States. The director instructed the petitioner to submit evidence to meet the guidelines set forth in *NYSDOT*.

In response, the petitioner indicated that he seeks employment relating to computer "security technology and infrastructure." He stated:

> My work experience at high technology companies developing innovative cutting edge information security solutions has been focused on the provision of value added technical and best practice security implementation advice to government, business & secure provider clients deploying information security technologies to secure their IT Infrastructure/sensitive Information assets and integration of same into their existing network environment.

The petitioner claimed extensive experience with a number of employers and clients, and stated: "I have also supported Federal Law Enforcement and Intelligence agencies but I am not at liberty to disclose their identities or the use case to which the product was applied due to the confidential nature of their operations and the need for preserving national security."

The petitioner listed various employers and described his projects there, but he submitted no evidence to support his claims or to establish the significance of his work. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner submitted background documentation to establish the intrinsic merit and national scope of his occupation. This evidence, however, does not relate specifically to the petitioner, and

therefore cannot show the significance of the petitioner's impact or influence on his field. The petitioner also submitted a copy of his résumé, which is several years out of date. The most recent employment listed was at [redacted] with no indication that his employment there ended in early 2006.

The director denied the petition on January 11, 2011. The director acknowledged the intrinsic merit of the petitioner's occupation, but found that the petitioner had described his intended employment in such vague terms that he had not established its national scope. Finally, the director stated that the petitioner had documented that he is a qualified software engineer, but had not distinguished himself or "shown why labor certification would be inappropriate in this case." The director noted that much of the petitioner's evidence is not "relevant to the issues raised by a request for a national interest waiver."

On appeal, the petitioner stated that his work has national scope because they involve "development of the critical network security appliances that will be used across the country (and internationally)." The AAO finds that the development of security software and related products is national in scope because, as the petitioner notes, these materials can often be widely disseminated (except in the case of custom products specifically designed for one particular system or network).

Regarding his impact on his field, the petitioner asserted that he had already described his claimed "work at start-up companies who have been pioneers on the cutting edge of technology," such as [redacted] the first manufacturer of VPN devices used to encrypt information sent over the internet to preserve privacy, confidentiality and integrity . . . and [redacted] the first manufacturer of Secure Identity & Access Management appliances for controlling access to networks based on unique identities." The petitioner did not, however, submit any evidence to show what his roles were at those companies, or (except in the case of [redacted] even prove that he worked there. The petitioner cannot establish his personal impact or influence on his field simply by identifying his prior employers and offering only the most general description of his work there.

The petitioner cites *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), stating: "the court enjoined the United States Citizenship and Immigration service to refrain from requesting evidence beyond those expressly stipulated in the relevant statute." The petitioner does not state how the director's decision goes against the *Kazarian* ruling; he simply alleges a general violation.

There is no question about the overall importance of computer security technology, but Congress did not establish a blanket waiver for software engineers with expertise in security. Therefore, it cannot suffice for the petitioner simply to establish a background in that field. In this instance, the petitioner has barely documented his past employment, let alone established that his contributions set him apart from others in the field to an extent that would warrant the special, additional benefit of an exemption from the job offer requirement that, by statute, normally applies to the classification he seeks.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job

offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

Review of the record reveals an additional ground for denial. The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections of ETA Form 9089), in duplicate. The petitioner did not execute this required document for the petition, and therefore the petitioner has not properly applied for the national interest waiver. This omission is, by itself, grounds for denial of the waiver request and, thus, the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.